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In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1825

BRUCE BAKER, etc.,

Petitioner,

vs.

F. DAVID MATHEWS, etc., et al.,

Respondent.

Petitioner's Supplemental Brief in Support of Petition for Writ of Certiorari

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Petitioner submits this supplemental brief in order to bring a new case to the Court's attention and to rebut the contentions of the Federal Respondents in their Memorandum in Opposition.

I. A NEW CASE DEMONSTRATES THE UNSETTLED STATE OF THE ISSUES HEREIN.

The case of *Mid Atlantic Nephrology Center, Ltd. v. Califano*, 433 F. Supp. 23 (D. Md. 1977) has appeared in the advance sheets since the filing of the Petition for Writ of Certiorari herein. The issues there are identical to those raised by this Petition, yet the District Court there reached the opposite conclusion from the Court of Appeals herein.

Plaintiffs in *Mid Atlantic* were a dialysis treatment facility operator and a State administrative body which sought to enjoin Federal approval of a competing dialysis clinic. Neither plaintiff had an administrative remedy to challenge the Federal approval, and neither sought recovery of Social Security benefits.

At the threshold the Court was faced with the issue of whether or not § 205(h) of the Social Security Act (42 U.S.C. § 405(h)) precluded jurisdiction under 28 U.S.C. § 1331 in light of the three recent Supreme Court rulings defining the scope of § 205(h), *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457 (1975); *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976); *Califano v. Sanders*, ... U.S. ....., 97 S. Ct. 980 (1977).[1] The District Court concluded that § 1331 jurisdiction was available. It distinguished the three Supreme Court cases on the very two grounds offered in the Petition to distinguish the case at bar: the absence of a statutory review process and the fact that the action did not seek to recover on a claim for benefits.

In these two respects, the case at bar is functionally identical to the *Mid Atlantic* case, for petitioner has no administrative remedy and does not seek to recover on a claim for benefits. The fact that the *Mid Atlantic* case arises under the Medicare Act rather than the Social Security Act is of no moment, for the ultimate issue in both cases is simply the scope of § 205(h). The *Mid Atlantic* case is the only case before the Court at all on point.

Clearly, the *Mid Atlantic* case, as well as other Medicare cases cited therein (see, e.g., *Americana Nursing Centers, Inc. v. Weinberger*, 387 F. Supp. 1116 (S.D. Ill. 1975);

1. 42 U.S.C. § 1395ii makes the provisions of § 205(h) applicable to actions arising under Title XVIII (Medicare) of the Social Security Act "to the same extent as they are applicable with respect to" Title II (Benefits) of the Act. 433 F. Supp. at 31.

Humana of South Carolina, Inc. v. Mathews, 419 F. Supp. 253 (D.D.C. 1976), appeal pending (particularly fn. 3)), conflicts with the decision of the Court of Appeals herein. A hearing by the Supreme Court of the case at bar would settle the issue left open by *Salfi* and subsequent cases as to the scope of § 205(h), i.e., whether § 205(h) precludes jurisdiction of actions against the Secretary which do not seek to recover on a claim for benefits and for which there is no administrative review. Because this issue arises in many contexts, its determination will have a far-reaching impact.

II. THE CONTENTIONS OF THE FEDERAL RESPONDENTS IN THEIR OPPOSITION DO NOT SUBSTANTIATE THE COURT OF APPEALS' DECISION.

The Federal respondents in their Memorandum in Opposition immediately acknowledge that the doctrine of exhaustion of administrative remedies does not apply to petitioner. Since this doctrine is the very premise of the Court of Appeals' decision, the decision should forthwith be vacated.

The Federal respondents offer two arguments to validate the Court of Appeals' decision. The first is that § 205(h) precludes jurisdiction to review petitioner's claim. The *Salfi, Eldridge,* and *Sanders* cases are cited for this proposition; yet, as just discussed, all three involve factual situations materially distinct from the case at bar.

The Federal respondents suggest that § 205(h) applies to all decisions of the Secretary, regardless of whether provision is made for administrative or judicial review thereof, and to all claims before the Secretary of whatever nature, regardless of whether for benefits or not. The statute does not support this reading.

The proscription against review of the decisions of the Secretary is clearly limited by the first sentence of § 205(h) to "decisions of the Secretary [made] after a hearing." Thus, where a decision is made without a hearing, as herein, there is no proscription.

Likewise, the proscription of actions against the Secretary does not apply to all claims. It specifically applies only to actions "to recover on any claim." As the *Mid Atlantic* Court has noted, any action for injunctive relief is not an action "to recover on any claim." The gravamen of petitioner's complaint is simply injunctive relief.

In discussing jurisdiction, the Federal respondents ignore the settled rule that jurisdiction is precluded only where there is "clear and convincing evidence" of such Congressional purpose. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141, 87 S. Ct. 1507, 1511 (1967). Section 205(h) provides no evidence that Congress intended to bar jurisdiction of actions for which there is no provision for administrative or judicial review or which seek relief other than recovery on a claim for benefits.

Thus, the Court of Appeals could not dismiss for lack of jurisdiction. In fact, it did not do so, as its abandonment of jurisdiction as the basis of its decision in its amended opinion on rehearing makes clear.

Likewise, § 205(h) is no bar to § 1361 jurisdiction, which the Federal respondents do not discuss. There is no clear and convincing evidence that § 205(h) was intended to preclude § 1361 jurisdiction, particularly since § 205(h) does not refer to § 1361. Notably, the Court in the *Mid Atlantic* case rejected § 1361 jurisdiction only because it could find no duty, not because § 205(h) was a bar. Implicit was the finding that such jurisdiction was available if the requisite duty could be established.

Thus, the only remaining prop for the Court of Appeals' decision is its afterthought regarding petitioner's standing to sue. Respondents suggest that petitioner lacks standing because his challenge is based on the Social Security Act, because there is no logical nexus between his status as a taxpayer of the School District and its improper contributions, and because the School District is not disabled fror. asserting its own rights.

Petitioner needs only show that he has a financial stake in the outcome of this litigation and that he is within the zone of interests to be regulated by the statute in question. *Association of Data Processing Service Organization, Inc. v. Camp,* 397 U.S. 150, 90 S. Ct. 827 (1970). He clearly has been injured by the challenged actions, for the School District's continued making of contributions substantially affects the amount of taxes he must pay. His is much more than the generalized interest of a citizen.

As well, the provisions of § 218 directly affect the conduct and finances of the School District. Section 218 is replete with references to political subdivisions and recognizes the possibility of employer contributions. See, e.g., § 218(e)(2). Thus, petitioner, as one of those who directly finances the School District, is well within the zone of interests to be regulated by § 218.

In also asserting the rights of the School District, petitioner comes within the exception to the *jus tertii* doctrine. By reason of the direct impact of the expenditures of the School District on him, he is so bound up in the interests of the School District that he will be directly affected by the outcome of the lawsuit and will be as effective an advocate as would the School District. *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868 (1976). Clearly, there is a genuine obstacle to the School District's assertion of its own rights, by reason of its continuing refusal to do so. *Id.*

Thus, petitioner urges the Court to hear this case not only to resolve an unsettled and important area of the law growing out of the Court's recent decisions but also to confirm the right of an injured party to obtain a judicial resolution of an important controversy which might otherwise go unresolved. Certainly the trend "toward enlargement of the class of people who may protest administrative action," *Data Processing, supra,* 397 U.S. at 154, 90 S. Ct. at 830, and the presumption in favor of judicial review of agency action, *Abbott Laboratories, supra,* justify the Court's hearing of this case.

Dated: September 28, 1977

Respectfully submitted,

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